Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1975

No. 75-996

NATIONAL ASSOCIATION OF MEAT PURVEYORS
and
NATIONAL RESTAURANT ASSOCIATION,
Petitioners,

vs.

EARL L. BUTZ, Secretary, Department of Agriculture, et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents.

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The National Association of Meat Purveyors (NAMP), and the National Restaurant Association (NRA), petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit (Court of Appeals) entered in these proceedings on November 14, 1975.

OPINIONS BELOW

The opinion of the District Court for the District of Nebraska (District Court) is reported at 395 F. Supp. 923 (D. Neb. 1975) and is reproduced in Appendix A hereto along with the District Court's unreported order.[1] The opinion of the Court of Appeals is not yet reported but is reproduced in Appendix B hereto. The Court of Appeals Order denying Petitioner's Petition for Rehearing with Suggestion For Rehearing En Banc is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1975. A timely Petition for Rehearing With a Suggestion for Rehearing En Banc, was denied by Order of the Court of Appeals on December 15, 1975. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

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1 In addition to Earl L. Butz, Secretary of the United States Department of Agriculture, respondents are Edwin L. Peterson, Administrator of the United States Department of Agriculture, Andrew Rot, Supervisor of the Meat Grading Branch of the United States Department of Agriculture at Omaha, Nebraska, and American National Cattlemen's Association (ANCA), appellants below. The Consumer Federation of America, National Consumers League, Americans for Democratic Action—Consumer Affairs Committee, National Consumers Congress, Public Citizen, Amalgamated Meat Cutter and Butcher Workmen of North America (AFL-CIO), Service Employees International Union (AFL-CIO) and American Federation of Teachers (AFL-CIO) have previously filed herein their petition for writ of certiorari docketed in this Court as Case No. 75-940.

QUESTIONS PRESENTED

1. Whether the Court of Appeals in finding that the District Court had exceeded the proper scope of review and conducted a trial de novo did so in contradiction of the established precedents set forth in *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U. S. 402, 28 L. Ed. 126, 91 S. Ct. 814 (1971), *National Nutritional Foods Association v. Weinberger,* 512 F. 2d 688 (2d Cir. 1975) and *South Terminal Corp. v. Environmental Protection Agency,* 504 F. 2d 646 (1st Cir. 1974).

2. Whether the Court of Appeals erred when it concluded that the failure of the United States Department of Agriculture (USDA) to follow Executive Order No. 11821, 39 Fed. Reg. 41501 (1974) (Executive Order) was not judicially reviewable, and that even if it was, petitioners lacked standing to obtain such judicial review.

3. Whether petitioners, on appeal, were entitled to rely on additional grounds presented to the trial court for affirmance of its decision without cross-appeal.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

Article 4, Section 3 of the United States Constitution:

> "He shall, from time to time, give to the Congress information on the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the Time of Adjournment, he may adjourn them to such time is he shall think proper; he shall

receive Ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States."

STATUTES

1. Agricultural Marketing Act of 1946, 7 U.S.C. § 1621 et. seq. Pertinent provisions of this statute are set forth in Appendix D *infra*, pp. D. 1-D. 2.

2. The Wage and Price Stability Act, 12 U.S.C. § 1904 (Supp. 1975). Pertinent provisions of this statute are set forth in Appendix D *infra*, pp. D. 2-D. 3.

3. The Administrative Procedure Act, 5 U.S.C. § 553(c) and 5 U.S.C. § 706(2)(A). Pertinent provisions of this statute are set forth in Appendix D *infra*, pp. D. 3-D. 4.

MISCELLANEOUS

1. Executive Order No. 11821, 39 Fed. Reg. 41501 (1974). This Executive Order is set out in full in Appendix D *infra*, pp. D. 4-D. 6.

2. Office of Management and Budget Circular No. A-107 as more fully set forth in Appendix D *infra*, pp. D. 6-D. 10.

STATEMENT OF THE CASE

This action commenced on April 11, 1975, when the United States District Court for the District of Nebraska (District Court) entered a preliminary injunction preventing the USDA from implementing new carcass beef

grading standards, (Revisions) 7 C.F.R. § 53.1 et seq. The Petitioner NAMP is a national association of meat purveyors comprising some 425 members located throughout the United States, Canada, and Mexico; Petitioner NRA is a national association of some 125,000 restaurants and some 1,500 members throughout the United States.

The preliminary injunction issued by the District Court was affirmed by the Court of Appeals which ordered the District Court to conduct a "plenary hearing." See Appendix C *infra*, pp. C. 1-C. 4. At this hearing, Petitioners NAMP and NRA successfully intervened. At the conclusion of said hearing, the District Court entered an order permanently enjoining implementation of the revisions. See Appendix A *infra*, pp. A. 24-A. 25.

On appeal, the decision of the District Court was reversed by the Court of Appeals. The Court of Appeals held that:

(a) The failure of the USDA to comply with the mandate of Executive Order No. 11821 in promulgating the revisions was an infirmity not judicially reviewable, and that in any event petitioners lacked standing to seek said judicial review.

(b) The failure of petitioners to cross-appeal the finding of the District Court that there was substantial evidence to support the Revisions relieved the Court of Appeals of the obligation of considering other grounds advanced by the petitioners which went to the issue of the arbitrary and capricious nature of the Secretary's action.

(c) The District Court conducted a de novo review when it received expert testimony to augment the administrative record, and relying on it in making its final decision.

(d) In its independent determination, the Revisions as they relate to yield grading only were not arbitrary and capricious.

(e) That the action of the Secretary in promulgating the revisions making yield grading mandatory is not beyond the scope of his authority or in violation of the Agricultural Marketing Act of 1946, 7 U. S. C. § 1622 et seq.

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STATEMENT OF FACTS

A. Background

On March 12, 1975, the Secretary caused the Revisions to be published in the Federal Register, which were to go into effect on April 14, 1975 (40 Fed. Reg. 11535).

The Revisions called for the lowering of the quality grades now used to measure the palatability of beef sold to the American public. The Revisions also make mandatory a quantitative grading of beef (that is the amount of muscle in relation to fat and bone in a carcass, i. e., cutability) on all beef graded for quality. The effect of the Revisions of the quality grades will be that the producer will be able to market beef of less quality at a higher price while the consumer will be purchasing lower

quality beef at a higher price, meaning that the price spread between the producer and consumer will be increased. At present, both the qualitative and quantitative analysis of beef carcasses are performed by the USDA on a voluntary basis.

Prior to the publication of the Revisions in the Federal Register, the President of the United States issued Executive Order No. 11821 (Fed. Reg. 41501) (1974) which required among other things that the Secretary advise the Office of Management and Budget as to the inflationary impact of the Revisions. Despite the nature of the Executive Order, the Secretary disregarded same and sought implementation of the Revisions without complying with it.

B. Proceedings Below

Prior to the effective date for the implementation of the Revisions the District Court issued a preliminary injunction enjoining the implementation of the Revisions on the application of the Independent Meat Packers Association (IMPA). This preliminary injunction was upheld by the Court of Appeals, 514 F. 2d 1119 (8th Cir. 1975), which ordered the District Court to conduct a "plenary hearing." At the conclusion of the plenary hearing the District Court permanently enjoined the implementation of the Revisions, 395 F. Supp. 923 (D. Neb. 1975). The District Court's decision was reversed by the Court of Appeals, and Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

This Court should issue a writ of certiorari in order to resolve the conflict which now exists between the First Circuit, Second Circuit and the Eighth Circuit Courts of Appeal with regard to the question of the scope of review allowed under 5 U. S. C. § 706 (2) (A).

In conducting a "plenary hearing" the District Court followed the guidelines set forth in *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U. S. 402 (1971). The Courts of Appeal for the First and Second Circuits have interpreted this precedent as allowing, when needed, the introduction of expert testimony to aid the reviewing court in determining the question of whether or not an administrative agency acted within the scope of its authority, contrary to law, in abuse of its discretion or in an arbitrary and capricious manner. The Court of Appeals for the Eighth Circuit has, in the instant case, given the opinion that under no circumstances can expert testimony be introduced as part of the trial court's judicial review.

This Court held, in *Citizens to Preserve Overton Park, Inc., supra,* that:

> "Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706(2)(A) requires a finding that the actual choice made was not 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law . . .' To make these findings the Court must consider whether the decision was based on a consideration of the relevant

> factors and whether there has been a clear error of judgment . . . although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the evidence." 401 U. S. 402 at 416.

In remanding the case to the District Court for a "plenary review" of the Secretary's decision, in *Overton Park, supra,* this Court noted that the review should be based on the full administrative record and that the District Court may require "administrative officials who participated in the decision, to give testimony explaining their action," 401 U. S. 402 at 420. This Court also suggested that the Secretary might prepare additional information for the District Court's review, cautioning that such "post-hoc rationale should be reviewed critically." This Court concluded by stating:

> "If the District Court decides that additional explanation is necessary, the Court should consider which method will prove the most expeditious so that full review may be had as soon as possible." 401 U. S. 402 at 420-21.

At the heart of the reason for granting the Writ is the interpretation to be given the language used by this Court in *Overton Park, supra,* to-wit:

> "Thus it is necessary to remand the case to the District Court for plenary review of the Secretary's decision. That review is to be based on the full administrative record that was before the Secretary at the time he made his decision. But since the base record may not disclose the factors that were considered by the Secretary's construction of the language, it may be necessary for the District Court to require some explanation in order to determine if

> the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard." 401 U. S. 402 at 420.

The exclusion of expert testimony from the judicial scope of review by the Court of Appeals is contrary to the decision of the Court of Appeals for the First Circuit in *South Terminal Corp. v. Environmental Protection Agency,* 504 F. 2d 646 (1st Cir. 1974). There, the First Circuit, in following the dictates of this Court in *Overton Park,* allowed the introduction of expert testimony and stated:

> "The normal way courts evaluate a technical issue is through procedings attended by expert witnesses. Yet, as an Appellate Court, we cannot conduct such fact-finding proceedings on our own. Congress has not interposed a District Court in the chain of review, so we cannot remand for clarifying findings of fact based perhaps on testimony by Agency and private experts. *Cf. Camp v. Pitts,* 411 U. S. 138, 142-143, 93 S. Ct. 1241, 36 L. Ed. 2d 106 (1972) . . . But when the question is one which the agency may never fully have confronted, and which may deserve further input both from agency and outside sources, only a remand for further hearings and an extended record seems adequate." 504 F. 2d at 665.

In *National Nutritional Foods Association v. Weinberger,* 512 F. 2d 688 (2d Cir. 1975), the Second Circuit citing *Overton Park, supra,* as authority directed the District Court to hold a hearing including, if necessary, testimony directed at the agency's *reasoning* by promulgating certain rules with regard to the classification of vitamins. It stated that the case at bar was:

> ". . . substantially similar to that encountered in *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U. S. 402, *supra,* and the remedy prescribed by the Supreme Court in that case appears to be appropriate here. Accordingly, we remand the case to the District Court with directions to conduct an *Overton* type hearing (including such affidavits or testimony as to the commissioners' reasoning as the Court determines necessary) for the purpose of determining whether, upon the entire administrative record before the Commissioner which the Court should scrutinize . . . the Commissioner acted irrationally in classifying the higher Vitamin A and D dosage levels as a drug . . ." 512 F. 2d at 703.

After this Court's decision in *Overton Park,* supra, and pursuant thereto, the District Court for the Western District of Tennessee conducted a hearing pursuant to its directives, *Citizens to Preserve Overton Park, Inc. v. Volpe,* 335 F. Supp. 873 (W. D. Tenn. 1972). That Court interpreted the dictates of this Court as allowing the introduction by plaintiffs of expert testimony to evaluate the investigation done by the Secretary of Transportation in determining the appropriate highway routes through the City of Memphis.

It is important that this Court resolve the questions relating to the scope of judicial review when expert testimony is involved to analyze the findings or lack thereof of an administrative agency. It should be noted that on remand the District Court for the Western District of Tennessee went beyond the District Court in the instant case and allowed expert testimony on the thought processes utilized by the agency in making its determinations.

II.

This Court should grant a writ of certiorari to pass on the nature of Executive Orders issued by the President of the United States and the standing of private litigants to enforce same against agencies of the executive branch of government.

It is well established that an executive order, validly enacted pursuant to the Constitution or an act of Congress, is to be accorded the same force and effect "given" to a statute validly enacted by Congress. *Farkas v. Texas Instruments, Inc.*, 375 F. 2d 629 (5th Cir. 1967), *Gnotta v. United States*, 415 F. 2d 1271, 1275 (8th Cir. 1969), *Farmer v. Philadelphia Electric Co.*, 329 F. 2d 3, 7 (3rd Cir. 1964).

The Court of Appeals adopts the position that the failure of the Eexcutive Order to cite specific authority other than the "Constitution and the laws of the United States" was an incurable infirmity. Such an argument must fail for two reasons. This Court in *Youngstown Sheet and Tube v. Sawyer*, 343 U. S. 597, 585 (1952), stated:

> "The President's power, if any, to issue the (executive) order must stem either from an act of Congress or from the Constitution itself."

Article II, Section 3 of the Constitution provides the President with sufficient support to issue the Executive Order. The Court of Appeals' holding that the Constitution alone is not sufficient to support the issuance of the

Executive Order is contrary to this Court's position in *Youngstown Sheet and Tube, supra.*

In addition, two statutes enacted by Congress are advanced as providing the legislative basis for the Executive Order, to-wit, the Agricultural Marketing Act of 1946, 7 U. S. C. § 1621, et seq., and the Wage and Price Stability Act, 12 U. S. C. § 1904 (Supp. 1975). Each of these statutory enactments provides a foundation for the Executive Order.

The thrust of the Secretary's argument and the net effect of the Court of Appeals decision is that the Secretary can disregard an Executive Order which fails to specifically state its tie to an act of Congress or provision of the Constitution. This Court should address itself to the question of whether or not this gives administrative agencies of the executive branch of government a license to avoid orders of the President which directly relate to the good of the citizens of this country. It is interesting to note that during and after the promulgation of the Revisions, the Secretary acted, although ineffectively and tardily, in such a way as to clearly indicate his belief that the Executive Order was law and required his compliance. It is only after his failure to comply that he contends he was not bound.

Perhaps more important for this Court's consideration as a basis for granting a writ of certiorari is the Court of Appeals position that private litigants lack standing to enforce Executive Orders of the President of the United States against various agencies of the executive branch. It is the belief of Petitioner that this Court has not directly addressed itself to this issue.

This Court has indicated in *Association of Data Processing v. Camp*, 397 U.S. 150 (1970), *Barlow v. Collins*, 397 U.S. 159 (1970), and *United States v. Students Challenging Regulatory Agency Procedure (SCRAP)*, 412 U.S. 669 (1973), the requirements for standing. Petitioners urge that as a group or separate they are well within the zone of interests to be protected by the Executive Order. Petitioners are the links in the chain of beef marketing which feed the animal prior to slaughter, which prepare the muscle for the consumer, and which directly serves the consumer at eating establishments both small and large throughout the United States. It should be noted that the remaining plaintiffs in this action are filing separate petitions and that collectively they add the packer and ultimate consumer to those opposed to the Secretary's actions.

The interest to be protected by the Executive Order is that of citizens generally to be free from government action which contributes directly to the inflation which many regard as the number one problem in this country. Simply put, the Secretary failed to consider the inflationary consequences of his action in order to benefit one segment of the industry, the producer, and this Court should comment on whether it is appropriate for him to be able to do so in violation of the Executive Order. As the Court of Appeals for the District of Columbia held in *Environmental Defense Fund, Incorporated v. Hardin*, 428 F. 2d 1093 (D. C. Cir. 1970):

> "Consumers of regulated products and services have standing to protect the public interest in the proper administration of a regulatory system enacted for their benefit." 428 F. 2d at 1097.

This Court and other Courts of Appeals have clearly established that an executive order, validly enacted pursuant to Constitutional or Congressional mandate carries with it the force and effect of law; and that private individuals within the "zone of interests" have the requisite standing to seek judicial review of a governmental agency's failure to obey the mandate of an executive order. Certiorari should be granted in this case so that this Court may review the contrary conclusions of the Court of Appeals.

III.

This Court should grant a writ of certiorari to review the Court of Appeals' holding that petitioners while seeking no additional relief, could not rely upon other grounds to support the decision of the District Court due to their failure to cross-appeal.

This decision of the Court of Appeals is contrary to a long line of decisions by this Court, as well as cases in the Court of Appeals itself.

United States v. American Ry. Express Co., 265 U. S. 425, 434 (1942); *Anderson v. Atherton*, 302 U. S. 643 (1937); *Jaffke v. Dunham*, 352 U. S. 280, 281 (1956). This Court stated in *Jaffke, supra*:

> "A successful party in the District Court may sustain its judgment on any ground that finds support in the record." 352 U. S. at 281.

The citation by the Court of Appeals to *Tiedman v. Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 513 F. 2d 1267, 1272 (8th Cir. 1975), supports rather than contra-

dicts the numerous holdings of this Court that a cross-appeal is not necessary when a party is seeking to support the judgment below.

The Court of Appeals held as "inapposite" this Court's finding in *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U. S. 281 (1974), that despite a finding of substantial evidence a trial court may still find the action of the agency to be arbitrary and capricious. The clear implication of the Court of Appeals' holding relative to the question of the responsibility of the prevailing party on appeal is that unless that party cross-appeals as to any finding by the lower court, he is in jeopardy of having all evidence which might support the lower court's decision disregarded or as in this case, never considered by the appellate court.

In the instant case, the evidence showing that the Secretary acted in an arbitrary and capricious manner and in abuse of his discretion both within and outside the administrative record is abundant, some of which is as follows:

1. The entire thrust of the studies relied on by the Secretary was based on the proposition that the implementation of the Revisions would result in the consumer being able to purchase beef, though of a lesser quality, at a lower price than he or she does so today. That is to say, that with the lowering of the choice grade to include meat that is now graded good, the producer would profit on the savings gained by feeding the animals less grain and that savings would be passed on to the consumer. There is not one shred of evidence to support this view

in the administrative record. Furthermore, a similar lowering of the quality grade in 1965 did not result in a lowering of the price to the consumer.

2. There is no evidenec within or without the administrative record to support the finding by the Court of Appeals that mandatory yield grading would result in the signaling to the producer of the kind of beef demanded by the consumer. In fact, the evidence adduced at the hearing shows the exact opposite to be the fact.

3. The administrative record clearly shows that the Secretary tampered with the comments taken during the comment period to water-down the overwhelming opposition of the consumers to the Revisions.

4. The evidence introduced at the District Court hearing clearly shows that the impetus behind the Revisions was due to the involvement and efforts of ANCA and designed to singularly benefit the producer at the expense of the marketing system and the ultimate consumer.

Finally, the Court of Appeals, in its opinion, failed to mention the finding of the District Court that:

> "In conclusion, the Court finds instances wherein the action of the United States Department of Agriculture, in promulgating revisions to rules found at 7 C. F. R. Sec. 53.102, 53.104, 53.105 and 53.203 to 53.206, was 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law', entitling plaintiffs to injunctive relief pursuant to 5 U. S. C. Sec. 706(2)(A). See, generally, *CPC International v. Train*, — F. 2d —; Nos. 74-1447, 1448, 1449 (8th Cir., May 5, 1975)." 395 F. Supp. 923, 933.

The petitioners respectfully submit that in disregarding the finding by the District Court that the Secretary acted in an aribtrary and capricious manner in promulgation of the Revisions as they relate to the lowering of the quality grading, the Court of Appeals acted contrary to the established law of this Court.

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CONCLUSION

For the reasons aforesaid, petitioners pray that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

NATIONAL ASSOCIATION OF MEAT PURVEYORS, and NATIONAL RESTAURANT ASSOCIATION,
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